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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ROSS W.,

Defendant and Appellant.

2d Crim. No. B202840
(Super. Ct. No. PS020616)
(Ventura County)

Ross W. appeals an order of the trial court placing conditions on his outpatient treatment pursuant to the Sexually Violent Predators Act ("SVPA"). (Welf. & Inst. Code, § 6600 et seq.) We remand for further proceedings pursuant to *In re E.J.* (2010) 47 Cal.4th 1258, 1265, 1283-1284, but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

In 1983, Ross W. committed rape on two victims. He was convicted of rape by false pretenses and forcible rape and sentenced to a prison term of eight years. (Pen. Code, §§ 261, subd. (a)(2), (5).)¹ In 1989, following his release from prison, Ross W. committed a forcible lewd act upon a child. (§ 288, subd. (b).) He was convicted and sentenced to a prison term of 13 years 6 months.

In 1997, Ross W. was committed to the Department of Mental Health as a sexually violent predator ("SVP"). The trial court extended his commitment based upon

¹ All further statutory references are to the Penal Code unless stated otherwise.

subsequent recommitment petitions. On March 10, 2006, the court granted his petition for conditional release into a one-year outpatient treatment program ("CONREP"), over the objections of the Department of Mental Health and the prosecutor. (Welf. & Inst. Code, § 6608, subd. (d).) Ross W. remained at the state hospital until appropriate outpatient housing could be found. (Former Welf. & Inst. Code, § 6608, subd. (f) [person shall be placed in the community within 21 days unless "good cause" for not doing so is presented to the court].)

On November 7, 2006, the electorate enacted Proposition 83, the Sexual Predator Punishment and Control Act: Jessica's Law (Prop. 83 as approved by voters, Gen. Elec. (Nov. 7, 2006); hereafter "Proposition 83"). The new law contains a provision prohibiting registered sex offenders from living "within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5, subd. (b).) Over Ross W.'s objection, the trial court ruled that Proposition 83 applied to him because he had not been released from custody when the law became effective. The court denied Ross W.'s motion for immediate release from the state hospital in order to determine where he could reside in compliance with section 3003.5, subdivision (b).

On July 18, 2007, we ordered the trial court to obtain a CONREP recommendation from the Department of Mental Health or release Ross W. into such a program with appropriate terms and conditions or, alternatively, to appear and show cause why a peremptory writ of mandate should not issue. In August 2007, the court ordered Ross W. released into a CONREP program with terms and conditions that comply with Proposition 83.

Ross W. appeals and contends that Proposition 83: 1) applies prospectively only and may not be applied to him; 2) violates ex post facto principles; 3) is unconstitutionally vague, overbroad and an unreasonable condition. He also contends that the trial court denied him due process of law by delaying his release into CONREP until after the passage of Proposition 83. Ross W. rests his contentions upon the federal and California constitutions.

DISCUSSION

I.

Ross W. argues that the trial court erred by applying the residency restrictions of Proposition 83 to him because the law is not retroactive. (*People v. Grant* (1999) 20 Cal.4th 150, 157 ["[T]he critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date"].) He contends that the last acts necessary for triggering the residency restrictions were his sexual offenses in 1983 and 1989 that required sex offender registration.

Our Supreme Court rejected this contention in *In re E.J.*, *supra*, 47 Cal.4th 1258, 1264, 1272, concerning parolees who had been released on parole and moved into a restricted zone after the November 8, 2006 effective date of Proposition 83. *E.J.* held that "[f]or purposes of retroactivity analysis, the pivotal 'last act or event' [citation] that must occur before the mandatory residency restrictions come into play is the registered sex offender's securing of a residence upon his release from custody on parole. If that 'last act or event' occurred subsequent to the effective date of section 3003.5(b), a conclusion that it was a violation of the registrant's parole does not constitute a 'retroactive' application of the statute." (*Id.* at p. 1274.) Apart from any question of unlawful delay (IV. *post*), Ross W. was released from custody as an outpatient and sought a residence subsequent to the effective date of Proposition 83.

Although *In re E.J.*, *supra*, 47 Cal.4th 1258, 1264, concerned the enforcement of residency restrictions as a condition of parole, the same analysis applies to Ross W.'s release to CONREP. Under the circumstances, the law is not being applied retroactively to him. (*Id.* at p. 1272 [residency restrictions applied to petitioners released from custody in noncompliant housing subsequent to effective date of section 3003.5, subdivision (b)].)

II.

Ross W. argues that the residency restrictions violate federal and state prohibitions against ex post facto laws because the restrictions are punitive in intent and effect. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.)

In re E.J., *supra*, 47 Cal.4th 1258, 1264, 1280, rejected the argument that the residency restrictions violate constitutional commands against ex post facto laws. "[T]he new residency restrictions apply to events occurring *after* their effective date--petitioners' acts of taking up residency in noncompliant housing upon their release from custody on parole after the statute's effective date. It follows that section 3003.5(b) is not an ex post facto law if applied to such conduct occurring after its effective date because it does not additionally punish for the sex offense conviction or convictions that originally gave rise to the parolee's status as a lifetime registrant under section 290." (*Id.* at p. 1280.)

Ross W. was released from custody after the effective date of Proposition 83 and section 3003.5, subdivision (b). We presume that he had fair notice prior to his release from custody of the new restrictions applicable to him. (*In re E.J.*, *supra*, 47 Cal.4th 1258, 1277-1278.) The residency restrictions are clearly intended to operate and protect the public in the present, not to serve as additional punishment for past crimes. (*Id.* at p. 1278.) Ross W.'s ex post facto claim is unavailing given the conclusion of our Supreme Court that Proposition 83 is not being applied retroactively. (*Id.* at p. 1279.)

III.

Ross W. claims the residence restrictions are unconstitutionally vague because they do not inform him where he is permitted to live. He points out that section 3003.5, subdivision (b) does not define "park" nor does it describe measurement of the 2000-foot exclusion area. Ross W. also argues that the residency restrictions are overbroad, unreasonable, and not narrowly tailored to serve a compelling state interest. He adds that they impair his constitutional rights to free association and to travel and are equivalent to banishment.

As our Supreme Court stated in *In re E.J.*, *supra*, 47 Cal.4th 1258, 1265, 1283-1284, resolution of these contentions requires an evidentiary hearing. At the hearing, the parties may introduce evidence, for example, regarding Ross W.'s current outpatient status, the precise location of his current residence and its proximity to a school or park "where children regularly gather" (§ 3003.5, subd. (b)), and a factual assessment of compliant housing presently available. (*E.J.*, at pp. 1265, 1283-1284 [nonexclusive statement of pertinent facts].) Factors in addition to those specifically described in *E.J.* may be relevant to Ross W.'s specific constitutional claims. (*Ibid.*)

IV.

Ross W. argues that he had a vested interest in release prior to the effective date of Proposition 83, and therefore is entitled to pre-Proposition 83 conditions. (*In re E.J.*, *supra*, 47 Cal.4th 1258, 1275-1276 ["It may be that if a registered sex offender was released from custody *on his current parole term* prior to November 8, 2006, and secured noncompliant housing prior to that date, in which he currently resides, application of the residency restrictions to him would constitute an impermissible retrospective application of the statute"]; *Doe v. Schwarzenegger* (E.D.Cal. 2007) 476 F.Supp.2d 1178, 1179, fn. 1 [holding that section 3003.5, paragraph (b) could not be applied retroactively to persons convicted of registrable offenses prior to the effective date of the statute "and who were paroled, given probation, or released from incarceration prior to that date"].) He asserts that his delayed release denied him due process of law because he is now subject to the terms of Proposition 83.

Former Welfare and Institutions Code section 6608, subdivision (f) provided: "If the court determines that the person should be transferred to a state-operated forensic conditional release program, the community program director, or his or her designee, shall make the necessary placement arrangements and, within 21 days after receiving notice of the court's finding, the person shall be placed in the community in accordance with the treatment and supervision plan unless good cause for not doing so is presented to the court."

From March 2006 until October 2006, a contractor with the Department of Mental Health worked to secure the housing component of Ross W.'s outpatient plan. Ross W.'s friend invited him to live in her Oxnard residence. The contractor investigated and planned fencing, GPS monitoring, boarding of the kitchen windows to prevent Ross W. from peering into a neighbor's home, thorough cleaning of the residence, and separate housing for Ross W.'s friend (she minimized his crimes), among other things. The trial court continued the matter during this period to allow the contractor sufficient time to secure safe housing to protect Ross W., his friend, and the community. There exists sufficient evidence of the implied finding of good cause for the trial court to have continued the matter until a plan was formulated and implemented.

Ross W. complains that the trial court continued the matter unnecessarily to await the passage of Proposition 83. Our review of the proceedings on October 26, 2007, reflects that following a chamber's discussion, the trial judge stated that "the proposal is to put the next hearing over to November 8th or 9th just to see what the status of [Proposition 83] is." The court then discussed the possibility of housing Ross W. in a trailer on county-owned property. Several weeks earlier, the trial court stated that housing Ross W. in his friend's house had not yet been determined and was still only a possibility. We disagree with Ross W.'s interpretation of the record.

We remand for further proceedings to determine and approve a residence that complies with *In re E.J.*, *supra*, 47 Cal.4th 1258, but otherwise affirm.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Rebecca Riley, Judge
Superior Court County of Ventura

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Xiomara Costello, Supervising Deputy Attorney General, Jason Tran, Deputy Attorney General, for Plaintiff and Respondent.